

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.**

R.S.A. No. 71 of 2005.

Judgement reserved on:

Date of decision : May 17, 2006.

Smt. Banti Devi Appellant.

Versus

Dalip Chand & ors. Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the appellant: Mr. Ramakant Sharma, Advocate.

For the respondents: Mr. R.K.Gautam, Sr. Advocate with
Mr. Anurag Sharma, Advocate, for
respondents No. 1 to 3.

Surjit Singh J. (Oral).

Heard and gone through the record. Late Sh. Bhagtu, now represented by his daughter, appellant in the appeal, filed a suit for declaration that he was owner in possession of certain property described in the plaint and that the sale of the said land made by respondent Dalip Chand, acting as his general attorney in favour of his (Dalip Chand's) wife Harbanso Devi respondent and further sale by respondent Harbanso Devi in favour of her son Gurbanchan Singh, also a respondent, were illegal, void and not binding upon

Whether reporters of local Papers may be allowed to see the judgment?

him. Further declaration was sought that compromise dated 28th September, 1995, arrived at, in an earlier suit filed by the said Bhagtu, against these very persons, in which too, the aforesaid sales were challenged, was also illegal and void, as fraud had been played upon him (said Bhagtu) in making him agree to that compromise. By way of further relief, prayer for permanent prohibitory injunction restraining the respondents from causing any interference in the possession of the plaintiff was made and in the alternative, prayer was made for passing a decree of possession of the suit land.

It was alleged that Bhagtu plaintiff was the owner in possession of the suit land. He had some litigation with one Amru. Bhagtu himself being unable to pursue that litigation wanted to appoint Dalip Chand, who was his neighbour, as his attorney for the purpose of pursuing that matter. Dalip Chand, however, got the instrument of power of attorney prepared so as to authorize him to transfer his property. Bhagtu was unaware of this authority when he signed the instrument. Later on he came to know that on the strength of the said instrument Dalip Chand had transferred his entire landed property in favour of his wife by means of a sale deed and his wife had further transferred it to her son also through a sale deed. The wife and the son of Dalip Chand, are respondents herein. Bhagtu then filed a suit seeking declaration that the sale of his property by Dalip Chand and then by his wife Harbanso, was illegal, void and of no consequence upon his right, as the instrument of power of attorney had been executed by him under the belief that it was only for pursuing the case in the court and the

clause authorizing said Dalip Chand to alienate the property had been incorporated surreptitiously. During the pendency of the suit filed by deceased plaintiff Bhagtu, Dalip Chand, allegedly approached him with an offer that he would pay him rupees two lacs in case the suit was withdrawn. Some respectable residents of the village intervened. Plaintiff agreed for the withdrawal of the suit on being assured that he will be paid rupees two lacs. He was paid only rupees ten thousand and the remaining amount was agreed to be paid within two months. Bhagtu then appeared in the court and made a statement abandoning the claim and also withdrawing the suit. One writing purporting to be a compromise deed, which simply stated that there had been a compromise between the parties and in terms of that compromise, the suit was to be withdrawn, was filed in the court. Statement of Bhagtu was also recorded. That suit was then dismissed as withdrawn.

It was alleged that in terms of the compromise arrived at in the earlier suit, remaining amount of rupees one lac ninety thousands had not been paid. Therefore, declaration was sought that the compromise was illegal and void as the respondent-defendant Dalip Chand had no intention to pay the aforesaid amount of money and also a prayer was made that the instrument of power of attorney executed in favour of Dalip Chand and the sale deeds made in respect of the property of Bhagtu by Dalip Chand, acting on the strength of power of attorney, and further sale made by vendee in favour of respondent Gurbanchan Singh were also illegal and void. In the alternative, prayer was made for passing a decree for a sum of Rs. 1,90,000/-.

Defendants contested the suit. They denied that instrument of power of attorney had been procured by playing fraud upon Bhagtu. It was also denied that there was an agreement for the payment of rupees two lacs to the plaintiff and it was because of such agreement that the earlier suit was withdrawn. The suit was alleged to be barred by principle of res judicata and was also alleged to be hit by the provision of Order 23, Rule 1(4) of CPC.

Learned trial court decreed the suit, holding that fraud had been played upon plaintiff Bhagtu in the matter of execution of instrument of power of attorney and also that defendant No.1 Dalip Chand had agreed to pay rupees two lacs in lieu of the plaintiff's agreeing to withdraw the earlier suit, but only a sum of rupees ten thousands had been paid and the defendants had backed out to pay the remaining amount of Rs. 1,90,000/-. Consequently, instrument of power of attorney and the sales were declared to be illegal and void. Compromise was also declared to be illegal and void. Defendants were restrained from causing any interference in the possession of the plaintiff over the suit land.

Defendants filed an appeal in the court of District Judge. Learned District Judge has accepted the appeal holding that there was a valid compromise between the parties in the previous suit and, therefore, the present suit was barred, under sub-rule(4) of Rule-1 of Order 23 of Code of Civil Procedure.

Now the legal representative of Bhagtu plaintiff, who died during the pendency of the present lis, has come in appeal to this court. It is alleged that the compromise was the result of fraud played upon Bhagtu by the defendants and hence the provision of

sub-rule (4) of Rule 1 of Order 23 of Code of Civil Procedure, is not attracted.

I have heard the learned counsel for the appellant. He has also taken me through the evidence. It was the case of the deceased plaintiff Bhagtu that as per compromise, he was to be paid rupees two lacs on account of the withdrawal of the earlier suit and that at the time of the execution of the sale deed and his making statement in the court for the withdrawal of the suit, only a sum of rupees ten thousands had been paid to him, while the remaining amount was agreed to be paid within two months. The compromise deed is dated 28th September, 1995. It was filed in the court on that very day. Statement of Bhagtu was also recorded in the court on 28th September, 1995 itself. At the time of making of the statement in the court, Bhagtu plaintiff was accompanied by his counsel, who counter-signed the statement. The suit out of which the appeal has arisen was filed on 28th October, 1995, i.e. to say only a month after the compromise was arrived at and signed by the parties. Now when according to the averments in the plaint, two months time was given to the defendant Dalip Chand for making the payment of the remaining amount of rupees one lac ninety thousands, the plaintiff could not have filed the suit just a month after the execution of the sale deed. This itself shows that the story regarding the agreement for payment of an amount of rupees two lacs has been cooked up. In the compromise-deed, as also in the statement, which Bhagtu made at the time of the withdrawal of the earlier suit, there is not even a whisper regarding payment of any amount of money by the defendants at the time of

the execution of the compromise nor an undertaking by him for payment of any money later on. The compromise deed is attested by two witnesses, namely Chet Ram, Pradhan, Gram Panchayat, Gullarwala and Om Parkash, Pradhan, Gram Panchayat, Padiayali. Om Parkash was examined by the plaintiff as PW 2. He corroborated Bhagtu's version that defendant had agreed to pay rupees two lacs. Defendants examined the other attesting witness Chet Ram, as DW 3. He not only did not corroborate the plaintiff's version, but also controverted the same when suggestions on the lines of the aforesaid plea of the plaintiff were thrown to him in the course of cross-examination. Statement of Om Parkash, Pw 2 does not fit in the pleaded version of the plaintiff. In the plaint, as already noticed, it is alleged that the plaintiff was approached by defendants at the place of his residence with an offer that in case he (plaintiff Bhagtu) withdrew the suit, defendant was ready to pay him rupees two lacs. However, PW 2 Om Parkash says that he had got the matter compromised and compromise deed Ex. PW 2/A, was reduced into writing. The witness, nowhere says that the plaintiff was approached at his place by the defendant, nor does he say that there was any time lag between the negotiations and the recording of the compromise deed. Compromise deed purports to have been written in the court compound.

The above discussed evidence suggests that the story put forward by the plaintiff that the compromise was the result of fraud is not correct. In other words, the compromise cannot be said to be illegal or void. If, that is so, the bar contained in sub-rule (4) of Rule 1 of Order 23, Code of Civil Procedure, will be applicable. Hence,

no fault can be found with the judgement and decree of the first appellate court dismissing the suit of the appellant- plaintiff on the ground that the same is barred, under Order 23, Rule 1(4) of the Code of Civil Procedure.

For the foregoing reasons, the appeal is dismissed.

CMP No. 113 of 2005.

Interim order dated 7.3.2005 stands vacated and the application is dismissed.

May 17, 2006.
(Hem)

(Surjit Singh),
Judge.